

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JANE DOES I, II, III, et al.,)
Plaintiffs,)
v.) Civil Action No. 3:20-1260
EUGENE SCALIA, United States) (JUDGE MANNION)
Secretary of Labor, et al.,)
Defendants.)

**RESPONSE TO MOTION FOR LEAVE TO PROCEED
UNDER A PSEUDONYM**

Defendants Eugene Scalia, United States Secretary of Labor, and Occupational Safety and Health Administration, United States Department of Labor, present this response to Plaintiffs' Motion to Proceed Under a Pseudonym. For the reasons that follow, Defendants do not object to Plaintiffs' Motion. However, because courts must satisfy themselves of their own subject matter jurisdiction, this Court should require Plaintiffs to come forward with some evidence to support their standing, even if that requires an *in camera* review.

In their memorandum of law, Plaintiffs apply the multi-factor balancing test in *Doe v. Megless*, 654 F.3d 404 (3d Cir. 2011), to show that their interest in proceeding under pseudonyms outweighs countervailing public interests. Doc. 4 at 7. Plaintiffs' primary concern appears to be retaliation from their employer if it becomes known that they made complaints to OSHA about health and safety conditions at their workplace. Doc. 4 at 8-10. Plaintiffs, of course, are protected from such retaliation under section 11(c) of the OSH Act, 29 U.S.C. § 660(c), and the *Megless* court indicated that economic harms, standing alone, are not usually sufficient to warrant anonymity. 654 F.3d at 408.

But the court also made clear that district courts have wide discretion to consider all relevant factors in a given case. *Id.* at 409. Here, the fact that OSHA is conducting an ongoing inspection of Plaintiffs' employer is an important factor that favors anonymity. OSHA vigorously protects the identity of employee complainants under the well-established government informant's privilege. *See, e.g., Donald Braasch Constr.*, 17 BNA OSHC 2082 (No. 94-2615 (1997)). Plaintiffs have alleged that they made complaints to OSHA about their working conditions, and the informant's privilege would be destroyed in their

case if they were required to proceed publicly here. In this matter, the public's countervailing interest in knowing Plaintiffs' identities does not outweigh the government informant's privilege, so Defendants have no objection to the Motion.

Given Plaintiffs' decision to proceed under pseudonyms, however, Defendants suggest that the Court should require some quantum of evidence beyond Plaintiffs' redacted declarations to establish that Plaintiffs have standing to bring this suit. *See United States v. Hays*, 515 U.S. 737, 742 (1995) (federal court must satisfy itself of its own jurisdiction); *Doe v. Hobson*, 300 F.R.D. 576 (M.D. Ala. 2014) (based on standing concerns, court allowed plaintiffs to withhold their identities from the general public but not from the defendants). The Court might, for example, require Plaintiffs to produce evidence of their standing *in camera* or through some other means by which their identities may be protected.

Respectfully submitted,

DAVID J. FREED
UNITED STATES ATTORNEY

Date: July 28, 2020

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania, and is a person of such age and discretion as to be competent to serve papers.

That on July 28, 2020, she served copies of the attached:

**RESPONSE TO MOTION FOR LEAVE TO PROCEED
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by ECF Filing upon:

Lerae Kroon, Esquire
Nina A. Menniti, Esquire
Samuel H. Datlof, Esquire

/s/ Christina M. Nihen
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